

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 August 2004

BALCA Case No.: 2003-INA-199
ETA Case No.: P2000-CA-09509105/ML

In the Matter of:

KARINA'S BAKERY,
Employer,

on behalf of

JULIO CESAR PONCE,
Alien.

Appearance: Luis A. Sabroso, Esquire
Anaheim, California
For the Employer and Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a United States Department of Labor Certifying Officer ("CO") of his application for alien labor certification. Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification, and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 11, 2000 the Employer filed an application for labor certification on behalf of the Alien to fill the position of Baker. (AF 14-15). The position required two year's experience in the position offered and a high school education. (AF 14).

By letter dated June 28, 2000, the Alien Labor Certification Office provided the Employer with instructions on recruitment, and directed the Employer to contact and arrange interviews of applicants within fourteen calendar days of receipt of any resumes. (AF 54-56). Subsequently, under cover letter dated August 21, 2000, the CO forwarded the Employer the resumes of five applicants. (AF 46-47). The CO repeated the instruction that the Employer contact the applicants within fourteen days, and also instructed the Employer to submit a signed statement of the efforts and results of the recruitment process. (AF 46-47).

The Employer responded by letter dated September 29, 2000, declaring that "all applicants were contacted and interviewed" by phone within the fourteen day period. (AF 20). The Employer further stated that he had sent the applicants letters offering interviews scheduled for October 3-4, 2000, but of the five total applicants, four failed without explanation to attend the scheduled interviews. (AF 20-45) Only one applicant interviewed with the Employer, but reportedly was no longer interested in the position. (AF 20). The Employer attached certified mail return receipt requests for each of the five applicants, postmarked September 19, 2000. (AF 22-24). The Employer also submitted return receipts for three of the five applicants, indicating delivery on September 23 and 28, 2000, with one return receipt lacking a delivery date. (AF 22-24).

The CO issued a Notice of Findings ("NOF") on October 30, 2002, proposing to deny certification on the basis that the Employer's recruitment effort was insufficient. (AF 10-12). Specifically, the CO considered the Employer's effort to be "tardy and incomplete," and doubted that the Employer contacted the applicants at all, "or 'as early as possible' as EDD had directed." (AF 11).

The Employer filed a rebuttal on November 21, 2002. (AF 5-7). The Employer argued that the applicants were each contacted by telephone within the fourteen days, but was unable to procure a phone bill verifying these calls because the phone company “is always changing,” and the Employer did not have advance notice that phone bill documentation would be required. (AF 5).

On February 4, 2003, the CO issued a Final Determination (“FD”) denying labor certification, finding that the Employer failed to properly document timely contact with the applicants. (AF 3-4).

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(7). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). An employer must therefore take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant’s qualifications. When an employer files an application for labor certification, it is signifying that it has a *bona fide* job opportunity that is open to U.S. workers. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*). Inherent in this presumption is the notion that the employer legitimately wishes to fill the position with a U.S. applicant and will expend good faith efforts to do so. *Id.* What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the particular facts of the case under consideration. In some circumstances, a reasonable effort requires more than a single type of attempted contact. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*).

An employer is under an affirmative duty to commence recruitment and make all reasonable attempts to contact applicants “as soon as possible.” *Id.* While there is no specific time limit within which an employer must contact applicants, the reasonableness of the time to contact applicants may depend on a variety of factors. *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991) (*en banc*). Such factors include whether the position requires extensive or

minimal credentials, whether recruitment is local or nonlocal, and whether many or few persons apply for the position. *Id.*

In the instant case, the Employer received five applicant referrals under cover letter of August 21, 2000, and was instructed on more than one occasion to contact the applicants within fourteen calendar days. (AF 46-47, 54-56). The Employer's recruitment documentation reflects that the Employer did not send interview letters to the five applicants until September 19, 2000. (AF 20-24). Given the minimal requirements of the position and that only five individuals applied for the position, four weeks is an unreasonably long time to review the applicant's resumes prior to contacting them. *Id.*; *Creative Cabinet & Store Fixture Co.*, 1989-INA-181 (Jan. 24, 1990); *AKS Jewelry Manufacturing*, 2000-INA-49 (Dec. 11, 2001). The Employer fails to offer any justification or excuse for the untimely contact, and such an unjustified delay undermines a finding that the Employer put forth a good faith effort in recruitment. *See Creative Cabinet*, 1989-INA-181 (Jan.24, 1990).

Furthermore, the Employer cannot establish that it made timely telephone contact with the applicants. In its rebuttal, the Employer offered no more than the blanket assertion that "the applicants were contacted by phone between the fourteen day period." (AF 5). The Employer reportedly could not provide telephone bills because his telephone company "is always changing," and despite this failure to even ask the phone companies for such records, the Employer offers neither notes on the alleged conversations nor prepared checklists to document what was discussed with the applicants. *See M.N. Auto Electric*, 2000-INA-165 (Aug. 8, 2001) (*en banc*) (*providing instruction that at a minimum, an employer must keep reasonably detailed notes on the conversation*); *Hopewell Co.*, 1989-INA-190 (May 23, 1990) (*allegations of telephone contact are insufficient, with no support of who made the calls or what was said in the conversation*). The Employer's mere assertion that it contacted the U.S. applicants by phone, without more, is insufficient to meet its burden in adequately documenting prompt contact with potentially qualified U.S. applicants. *Id.*; *Brilliant Ideas, Inc.*, 2000-INA-46 (May 22, 2000). Moreover, the CO's suspicion that the Employer did not contact the applicants at all is bolstered by the Employer's letter dated September 29, 2002, recounting the results of interviews on October 3-4, 2000.

For the foregoing reasons, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.